

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA TRANSPORTATION REGULATION BOARD

In the Matter of the Petition
of DeLaria Transport, Inc.
(Transferor) and Mississippi
ONTINUANCE.
Transport, Inc. (Transferee)
for Authority to Transfer
BOARD
Petroleum Carrier Certificate
Held by Transferor to Transferee.

ORDER ON MOTIONS, ORDER
GRANTING BRIEF

AND ORDER CERTIFYING
CERTAIN MATTERS TO THE-

On March 31, 1988, a Motion for Continuance was filed by Protestants herein. The Motion sought an indefinite continuance pending the outcome of a related matter presently on appeal to the Court of Appeals.

On April 19, 1988, Petitioners filed a response to the Motion. Petitioners oppose any continuance on the merits, and on a procedural ground as well: that the Motion is invalid because a copy was not served on the Agency as required by rule. Petitioners also asked that if either Motion were denied by the Administrative Law Judge, then the Motions be certified to the Agency.

Appearing on behalf of the joint Petitioners is Grant J. Merritt, Attorney at Law, 4644 IDS Center, Minneapolis, Minnesota 55402. Appearing on behalf of Protestants Dahlen Transport, Inc., Wayne Transport, Inc. and Indianhead Truck Line is Robert S. Lee, Mackall, Crounse & Moore, Attorneys at Law, 1600 TCF Tower, 121 South Eighth Street, Minneapolis, Minnesota 55402 and William E. Flynn, Lindquist & Vennum, Attorneys at Law, 4200 IDS Center, Minneapolis, Minnesota 55402. Appearing on behalf of Protestant Quickie Transport, Inc. is Earl Hacking, Lawyers, Ltd., Wirth Park Office Center, 700 Meadow Lane North, Minneapolis, Minnesota 55422. Appearing on behalf of Protestant Transport, Inc. is Jeffrey J. Pitsenbarger, Attorney at Law, P.O. Box 400, Moorhead, Minnesota 56560.

Based upon all the filings and proceedings herein, and for the reasons set forth more fully in the Memorandum attached hereto which is incorporated herein, the Administrative Law Judge makes the following:

ORDER

1. That Protestants' Motion for an indefinite continuance is DENIED.
2. That Petitioner's Motion to dismiss the petition for failure to serve the Agency is DENIED.
3. That the hearing in this matter be continued, for a brief period, while the Board considers the following question, which is CERTIFIED to it:

is it appropriate to include in the record of this certificate transfer proceeding evidence and argument regarding dormancy?

Dated this 25th day of April, 1988.

ALLAN W. KLEIN
Administrative Law Judge

MEMORANDUM

These Motions are part of the regulatory process surrounding the sale of DeLaria's petroleum business to Mississippi. initially, DeLaria held an IRCC permit allowing it to transfer both petroleum products and Non-petroleum products. with various geographic limitations, Mississippi, on the other hand, holds a petroleum certificate, allowing it to transfer petroleum products.

At some time in 1987, DeLaria and Mississippi determined that DeLaria's petroleum business (and some petroleum equipment) would be sold to Mississippi. Mississippi would continue in petroleum carriage, while DeLaria would engage in its vegetable oil and other non-petroleum carriage.

The two prepared a contract which provided that DeLaria would first seek the redesignation of a part of its IRCC permit to a petroleum carrier certificate. At the time the contract was executed, Mississippi would advance a small part of the purchase price to DeLaria, but the bulk of the purchase price would be placed in escrow pending final approval of the transfer of DeLaria's authority to Mississippi. If final approval were not received, then the money in escrow would be returned to Mississippi.

On July 23, 1987, DeLaria and Mississippi filed a joint petition seeking a temporary lease of DeLaria's petroleum carrier certificate (which had not yet issued at that time) as well as a petition for permanent transfer of the certificate.

On July 29, 1987, the Board authorized the issuance of a petroleum carrier certificate to DeLaria, ex Parte. On the same day, the Board issued an Order authorizing the temporary lease of the certificate from DeLaria to Mississippi for a period of six months from July 29, 1987, or until the Board issued an Order on the permanent transfer of the certificate.

On July 31, 1987, the Board published notice of DeLaria's petition for redesignation. A protest was filed, and the matter was set for hearing on October 15, 1987 before this Administrative Law Judge. Following discussion on the day of the hearing and the receipt of briefs, the Administrative Law Judge, on December 8, 1987, recommended to the Board that it allow the

redesignation of the petroleum authority issued to DeLaria from an IRCC permit

to a petroleum carrier certificate with the same limitations. The Board adopted that recommendation, and issued certificate PC-182 to DeLaria.

Soon thereafter, the Board's Order issuing Certificate PC-182 was appealed to the Minnesota Court of Appeals. That appeal is currently in progress, with briefs just beginning to be filed.

There are at least two reasons that all of the above was required in order to accomplish the sale of DeLaria's petroleum business to Mississippi. Both reasons are statutory prohibitions contained in Minn. Stat. 221.151. Pertinent parts of that statute provide as follows:

Permits..... issued under section 221.121 [such as DeLaria's IRCC permit] may be assigned or transferred but only upon Order of the Board..... after notice and hearing.

Provided, however, that the Board shall make no Order granting the sale or lease of a permit to a person or corporation or association which holds a certificate or permit..... from the Board under this chapter

In determining the extent of the operating authority to be conducted by the transferee under the sale or lease of the permit, the past operations of the transferor within the two-year period immediately preceding the transfer must be considered. Only such operating authority may be granted to the transferee as was actually exercised by the transferor under the transferor's authority within the two-year period immediately preceding the transfer

Neither of those two limitations applies when a certificate (such as DeLaria's newly-issued PC certificate) is sold or leased. Minn. Stat. 221.081 does have certain filing requirements, notice provisions and decisional standards which govern the sale or lease of a certificate, but it does not include the two limitations which would apply to the sale or lease of a permit. It was to avoid those two limitations that DeLaria sought the redesignation of its permit to a certificate.

What is before the Judge and the Board at this time is the joint petition to transfer the newly-issued PC certificate from DeLaria to Mississippi. Protestants herein seek the indefinite continuance because the outcome of the appeal of the Board's redesignation proceeding would, they allege, have a significant bearing on the scope of the transfer proceeding. They point out that the Board's approval of a temporary lease to Mississippi means that Mississippi would not be materially harmed by the delay, and that waiting for the Court of Appeals to act would avoid the potential for a waste of effort and possibly needless expenditures by all parties. One of the allegations in

the Motion for continuance is that if the appeal is unsuccessful, and the sale is to be that of the newly-issued petroleum certificate, then the Protestants intend to raise the following issue:

. . . Whether the Transportation Regulation Board has any implicit duty under Minn. Stat. 221.081 to eliminate dormant portions of a certificate being transferred in

order to avoid the creation of additional competition unsupported by evidence of a public need.

Protestants also point out that if the appeal is successful, and the sale would be one of a permit, then the authority to be transferred would be that which had been exercised within the past two years, which is materially different than the authority that can be transferred under a certificate.

The Petitioners responded to the Motion for continuance by pointing out that DeLaria is prejudiced by a delay because it will not get its money until the final approval by the Board. In addition, they point out that if the Court reverses the Board's redesignation order, and the sale were that of a permit, then the sale would be prohibited because Mississippi already holds a certificate and the statute quoted above prohibits the sale of a permit to a person which holds a certificate or permit. They argue, therefore, that there would be no proceeding requiring an examination of the past two years' activity. If, on the other hand, the Court reverses the Board's redesignation order and requires a hearing on the issue of dormancy, then there would be a new hearing required in the redesignation case that would preclude the need for dealing with dormancy in this transfer proceeding.

The joint Petitioners disagree with Protestants regarding whether or not the Board has any duty to consider dormant portions of a certificate when that certificate is proposed to be sold. That is the issue discussed in the above-quoted portion of Protestants' Motion. While the Administrative Law Judge does not want to foreclose Protestants' argument before they have been given an opportunity to present it, he must evaluate the likelihood of its success in determining the weight to be given it in determining the Motion for continuance.

Petitioners point out that this issue was recently raised, and rejected by the Board. In the Matter of the Joint Petition of Advanced United Expressways, Inc., Transferor, and Morrell Transfer, Inc. Transferee, RRCC 405, Order 2082/2/T-87-26. In that case, the Board adopted, without comment, the recommendation of Administrative Law Judge Richard DeLong, which considered whether or not dormancy provided any basis for prohibiting the transfer of a certificate. It is unknown to what extent the issue was actually argued

before the Board. In that decision, Judge DeLong and the Board relied upon the fact that the Legislature has placed certain requirements upon the sale of a permit, but different requirements upon the sale of a certificate. They pointed out that the dormancy test is set forth in the statute relating to the sale of permits, but not in statutes relating to the sale of certificates

The history of the regulation of petroleum carriers is too long, and too tangential, to relate in detail now. Suffice it to say that in 1957, when the Legislature repealed the Petroleum Carrier Act, it had the choice of treating petroleum carriers like permit carriers, or like certificate carriers. It was clear that there was a difference between the two, primarily with regard to the showing that had to be met prior to allowing a new entrant into the market. But there is also a difference when it comes to a sale or a lease. The difference between the two has been recognized by the courts and the Board. Mitchell

Transport, Inc v. Railroad and Warehouse Commission, 272 Minn. 121, 137 N.W.2d 561, 565 (1965) and Report of the Hearing Examiner, In the Matter of the Petition of GWNCO Transport, Inc.____. . , PUC-82-066-BC, PC 113/A-81-1107, Order No. 1 (1982), at p. 25. The Legislature elected, for whatever reason, to place petroleum carriers into the category of certificated carriers.

It could be argued that evidence relating to dormancy ought to be considered because it is the same evidence that relates to the statutory test of will not have an adverse effect on any other motor carrier. That test, however, is in the sentence that relates to ex parte orders. In fact, the Administrative Law Judge is not aware of any statute which sets forth what the tests ought to be in determining whether or not to allow the sale of a PC certificate when the matter is contested and a hearing is held. There are enough uncertainties surrounding this matter that it is appropriate to get them resolved before any hearing is held, so that if a hearing is held, it will include the appropriate matters, and exclude the inappropriate ones.

Since the dormancy question is being certified, the Administrative Law Judge would not oppose the Board's indicating its position on the indefinite continuance question. The Administrative Law Judge would recommend going ahead with the hearing because there is a presumption that the Board's decision on the redesignation is correct. The mere fact that it is on appeal does not mean that the Board and the parties cannot proceed as if the Board was correct. However, the Board must bear the cost of the administrative hearing in this certificate transfer proceeding, and the Administrative Law Judge would certainly give deference to the Board's indicating that it favored an indefinite continuance if that is the Board's desire. However, the ultimate decision on that question must be made by the Administrative Law Judge because it is not a certifiable question.

Therefore, the hearing in this matter is continued for a brief period of time, only so long as is necessary to allow the Board to act and for the Administrative Law Judge to reschedule the hearing at a time which is convenient for all participants. After the Board has acted, the Administrative Law Judge will consult with the participants and establish a new date for the hearing (unless it is indefinitely continued).

A.W.K.

